

**REMARKS**

Claims 1-32 are currently pending in the application.

**I. Summary of Interview Regarding Improper Finality**

Applicants would like to thank Examiners Bhat and Caldarola for conducting telephone interviews on March 14 and 15, 2005, and for mailing an examiner's Interview Summary dated March 17, 2005. Applicants presented their view, and continue to present their view, that the office action dated January 10, 2005, was improperly made final because claim 25 was rejected on a new ground that could not have been necessitated by an amendment because claim 25 was not amended.

**II. Rejection Under 35 USC 103(a) of Claims 1-24 and 26-32**

Claims 1-24 and 26-32 have been rejected as obvious over WO 96/37120 (Herbert). Specifically, the office action states that Herbert teaches the factors in how to prepare a frozen concentrate and frozen cocktail beverage having a Brix value within the ranges as claimed by Applicants. Applicants respectfully disagree.

The office action acknowledges that Herbert does not specifically teach the amount of high potency sweetener, flavoring, sugar substitute or ethanol. In addition, the "concentrate" in Herbert does not contain any ethanol.

Herbert states that "the Brix of the blended, finished cocktail is in the range of 9.0° to 15.0°." See abstract. In contrast, claim 1 recites a 3X concentrate that would have a final Brix value of less than 11° after dilution. To the extent that these ranges overlap, one of ordinary skill in the art, based on the teachings of Herbert, would have no motivation to prepare a cocktail having a Brix value of less than 11° and an ethanol content of about 0.1 to about 4%.

Instead, Herbert teaches using a higher amount of alcohol for a low-Brix cocktail. Specifically, Herbert states that "alcohol as a diluent greatly aids in blending of the frozen concentrate to form the finished drink. Non-alcoholic slush drinks are therefore more difficult to blend . . . and offer less latitude in the range of portions of ingredients and other process parameters than alcoholic frozen cocktails." P. 12, ll. 1-14. Herbert goes on to state that solid content, or Brix, "is a key factor in the blendability of the frozen concentrate into a good slush. More specifically, softly frozen samples with a Brix value below 12.5°, and certainly below 10.0° are difficult to crush and do not produce a uniform particle size in a blended frozen drink

product.” P. 16, ll. 13-20. The alcoholic examples of Herbert use 4-5% by weight ethanol. See p. 13.

Thus, the teaching of Herbert is that a substantial amount of alcohol should be added to any cocktail having a final Brix value at the low end of range of 9.0° – 15.0°, such as less than 11°. Thus, Herbert fails to provide any motivation to one of ordinary skill in the art to prepare the low-ethanol, low-Brix concentrate or freezable beverage of the claimed invention.

II. Rejection Under 35 USC 103(a) of Claim 25

Claim 25 is directed to a water-based creamer comprising various amounts of emulsifier, stabilizer, sweetener and fat. The office action does not identify anything in Herbert suggesting the use of an emulsifier or a stabilizer in its cocktail concentrate, let alone in the claimed ranges. Thus, Herbert cannot support a prima facie case of obviousness. Withdrawal of this rejection is therefore respectfully requested.


CONCLUSION

In view of the foregoing amendments and remarks, Applicant respectfully requests allowance of the pending claims. The Examiner is invited to contact the undersigned attorney to discuss any matter concerning this application. The Commissioner is hereby authorized to charge any fees which may be necessary for consideration of this paper to Kenyon & Kenyon Deposit Account No. 11-0600.

Respectfully submitted,

KENYON & KENYON

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